JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Probate and Mental Health Advisory Committee
Hon. Stephen D. Cunnison, Chair
Douglas C. Miller, Committee Counsel, 415-865-7535,
douglas.miller@jud.ca.gov

DATE: August 18, 2003

SUBJECT: Probate Forms: *Capacity Declaration–Conservatorship* and *Dementia Attachment to Capacity Declaration–Conservatorship*
(revise form GC-335 and adopt form GC-335A)(Action Required)

Issue Statement

The Probate and Mental Health Advisory Committee proposes extensive revisions of form GC-335 because (1) it encourages conservators to make unnecessary or inappropriate requests for exclusive authority to consent to medical treatment for their conservatees or for "dementia powers" under Probate Code section 2356.5—authority to place conservatees in restricted-egress facilities or to consent to administration of psychotropic medications for persons with dementia, (2) it does not comply with statutes concerning competency determinations and requests for dementia powers, and (3) it must be signed on page 3 and all three pages must be filed even though page 1 contains all of the information necessary for one of the form's authorized purposes.

One of the revisions of form GC-335 intended by the advisory committee to address the first concern expressed above would remove the material on dementia powers from form GC-335 and place that material in a new form GC-335A, *Dementia Attachment to Capacity Declaration–Conservatorship*.

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2004:

1. Revise form GC-335 to:

a. Permit filing of page 1 only when the form is used solely to excuse a proposed conservatee's absence from the hearing on the appointment of a conservator;

b. Revise item 6B(1) on page 2 to provide for separate assessments of a (proposed) conservatee's short-term, long-term, and immediate-recall memory;

c. Provide a place for the initials of an authorized medical expert declarant below item 7 at page 3 of the form, to confirm the declarant's conclusion that the (proposed) conservatee lacks the capacity to give informed consent to any form of medical treatment; and

d. Remove the material concerning dementia powers in item 8 on page 3.

2. Adopt new form 335A, *Dementia Attachment to Capacity Declaration—Conservatorship*, to include the material concerning dementia powers removed from item 8 of form GC-335, redesignated as item 9, and revised to:

   a. Replace the description of authorized placements of patients suffering from dementia in former item 8a with the phrase "secured-perimeter residential care facility for the elderly" in the instructions for item 9a, and thereafter as "restricted and secure" or as placement in a "locked or secured-perimeter facility" in item 9a;

   b. Require the medical expert declarant to provide detailed information on the (proposed) conservatee's condition and the reasons for his or her placement in a restricted and secure facility or the administration of psychotropic medication; and

   c. Require the medical expert declarant to specifically identify the deficits in the (proposed) conservatee's mental functions that impair his or her ability to appreciate or understand the consequences of giving or withholding consent to placement in a restricted and secure environment or administration of psychotropic medications for the treatment of dementia.

Revised form GC-335 is attached at pages 16–18. New form GC-335A is attached at page 19. A copy of current form GC-335 is attached for information purposes at pages 20–22.

Rationale for Recommendation

Form GC-335, *Capacity Declaration–Conservatorship*, may be used for one or more of three purposes: (1) to provide evidence of a proposed conservatee's inability to attend the hearing on the petition for appointment of a conservator, (2) to provide evidence of a conservatee's mental condition in support of a conservator's request for exclusive authority to consent to the conservatee's medical treatment, or (3) to provide evidence of a conservatee's mental condition in support of a conservator's request for dementia powers under Probate Code section 2356.5.

Form GC-335 should be revised (1) to discourage unnecessary or inappropriate applications by conservators for exclusive authority to consent to medical treatment for conservatees or for dementia powers, (2) to comply with statutes concerning competency determinations and requests for dementia powers, and (3) to improve the form's manner of execution and filing for all three authorized purposes.

Encouragement of unnecessary or inappropriate applications
Form GC-335 encourages unnecessary or inappropriate applications for extraordinary powers because the medical expert declarant may select standard text merely by filling in checkboxes and is not required to provide any direct testimony. In addition, item 8 of the form suggests that the purpose of authority to place a (proposed) conservatee suffering from dementia in a secure facility is merely to enable the conservator to place the conservatee in a secure environment, rather than in a facility that restricts the conservatee's freedom of movement.

The revisions are intended to ensure that both the (proposed) conservator and the medical expert declarant exercise independent judgment and carefully consider the situation before requesting extraordinary powers or providing evidence in support of such a request. New instructions for item 9a of proposed new form GC-335A and other references to authorized placements in that item would clarify that the placement is intended to restrict the conservatee, not merely to make him or her more secure.

Noncompliance with statute
Existing form GC-335 does not comply with Probate Code section 811 and 2356.5 in three respects.

First, the form does not request evidence showing a relationship between a deficit in a conservatee's mental functions identified in item 6 of the form and the decisions that the conservatee allegedly lacks the capacity to make. This issue would be addressed in item 9a(4) of new form GC-335A by requiring the medical expert declarant to specifically identify the deficits in mental functions that significantly impair the conservatee's ability to understand and appreciate the consequences of those decisions.

Second, form GC-335 does not request evidence that the conservatee's proposed placement in a secured-perimeter facility is the least restrictive placement appropriate to the conservatee's needs. The court may authorize the conservatee's placement in a locked facility only if it makes a finding supported by substantial evidence that the placement is the least restrictive appropriate to those needs. Item 8 on page 3 of existing form GC-335 is silent on this issue. The advisory committee proposes to add an item 9a(5) to new form GC-335A to supply the expert medical declarant's opinion as evidence in support of the required finding.

Third, item 8a of form GC-335 refers to a facility authorized to receive dementia patients by a statute that has been repealed. The advisory committee recommends deletion of language that describes the facility authorized by the repealed statute.

Changes in the forms' manner of execution
Form GC-335 must now be signed at the bottom of page 3 and all three pages must be filed, even when only page 1 is used to support a proposed conservatee's absence from the hearing on appointment of a conservator. The advisory committee proposes to change the way form GC-335 may be signed and filed so the form more easily and directly meets the particular purposes for which it may be used.

Alternative Actions Considered
No alternatives to a revision of form GC-335 were considered. Many of the changes must be made to comply with current law. The committee initially planned to keep the dementia material in the revised form GC-335. It decided to place this material in a separate form to reduce unnecessary or inappropriate applications for dementia powers.

Comments From Interested Parties
Seven comments were received from the public concerning the revised and new forms. Five approved if the forms are modified, one disapprove, and one approved without specific comments. A chart showing these comments and the advisory committee's responses is attached at pages 23–32.

Several commentators expressed their view that the forms will be more difficult for medical declarants to complete, and therefore will result in reduced cooperation by physicians or increased expense to attorneys, their conservator clients, and, ultimately, the estates of conservatees. The advisory committee believes that these proposals would give increased protection to conservatees against unnecessary or inappropriate applications for the extraordinary powers involved, and that support of this statutory purpose outweighs any temporary increased difficulty for declarants or petitioning conservators or their attorneys.

The advisory committee recommends against other changes requested by other commentators, including placement of text advising medical declarants that certain exceptions to physician-patient evidentiary privileges apply to them. The committee also does not recommend making the forms confidential without statutory or Rule of Court authority.

Implementation Requirements and Costs
No special requirements or costs are expected.

Attachments

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SUBJECT: Probate Forms: *Capacity Declaration–Conservatorship*, and *Dementia Attachment to Capacity Declaration–Conservatorship*
(revise form GC-335 and adopt form GC-335A)(Action Required)

Issue Statement

The Probate and Mental Health Advisory Committee proposes extensive revisions of form GC-335 because (1) it encourages conservators to make unnecessary or inappropriate requests for exclusive authority to consent to medical treatment for their conservatees or for "dementia powers" under Probate Code section 2356.5—authority to place conservatees in restricted and secure facilities or to consent to administration of psychotropic medications for persons with dementia, (2) it does not comply with statutes concerning competency determinations and requests for dementia powers, and (3) it must be signed on page 3 and all three pages must be filed even though page 1 contains all of the information necessary for one of the form's authorized purposes.

One of the revisions of form GC-335 intended by the advisory committee to address the first concern expressed above would remove the material on dementia powers from form GC-335 and place that material in a new form GC-335A, *Dementia Attachment to Capacity Declaration–Conservatorship*.

Rationale for Recommendation

Form GC-335, *Capacity Declaration–Conservatorship*, may be used for one or more of the following purposes:

1. To provide expert evidence of a proposed conservatee's inability for medical reasons to attend the hearing on the petition for appointment of a conservator (Prob. Code, § 1825);
2. To provide expert medical or psychological evidence of a conservatee's mental condition in support of a conservator's request for exclusive authority to give consent to medical treatment for the conservatee (Prob. Code, § 1890); or
3. To provide expert medical or psychological evidence of a conservatee's mental condition in support of a conservator's request for "dementia powers"—the exclusive powers to place the conservatee in a secured-perimeter residential care facility or to consent to the administration of psychotropic medications appropriate for the treatment of dementia (Prob. Code, § 2356.5).

This form should be revised to discourage unnecessary or inappropriate applications for exclusive authority to give medical consent or for "dementia powers" that might be caused or made more likely by the existing form, to comply with the statutes concerning competency determinations and requests for dementia powers, and to improve the form's manner of execution and filing for all three authorized purposes.

Encouragement of unnecessary or inappropriate applications
Form GC-335 encourages unnecessary or inappropriate applications for extraordinary powers for two reasons. First, the medical expert declarant may select standard text merely by filling in checkboxes in items 7 and 8 of the form or may simply sign and return the form after the petitioner or the petitioner's attorney has already filled in the checkboxes. The form does not require the declarant to provide any direct testimony on the critical issues addressed by the declaration. Second, item 8 of the form refers to the facility where a conservatee suffering from dementia may be placed as a "secured facility" or a "secured nursing facility." A conservator may decide to request dementia placement authority or a declarant may decide to support that request because the current language encourages them to believe that the conservatee will be placed in a secure environment, a seemingly worthy goal given the conservatee's infirm condition. The language does not convey the full meaning and true purpose of the requested placement. That purpose is to restrict the conservatee's freedom of movement.

The revisions are intended to address the problem of unnecessary or inappropriate requests for extraordinary powers by ensuring that both the (proposed) conservator or counsel and the medical expert declarant exercise independent judgment and carefully consider whether or not to request extraordinary powers or give testimony in support of such a request. The dementia-powers material in item 8 of the existing form is moved to item 9 in new form GC-335A, an attachment to revised form GC-335 to be used only when dementia powers are requested. In addition, the declarant is required to initial the form below item 7 on page 3 of form GC-335 when he or she concludes that the conservatee lacks capacity to give informed consent to medical treatment. The declarant

is also required to state reasons why placement in a restricted-egress facility or administration of psychotropic medications is necessary or would be beneficial to the conservatee suffering from dementia and to list the specific psychotropic medications that would be administered.

Revisions of item 9a in form GC-335A clarify the level of restrictions in a conservatee's proposed placement. The item's revised instructions refer to a facility where the conservator would be authorized to place a conservatee with dementia as a "secured-perimeter residential care facility for the elderly."[1] The facility is also referred to as a "restricted and secure facility" (item 9a(1)), a "restricted and secure environment" (item 9a(4)), and a "locked or secured-perimeter facility" (item 9a(5)). These changes clarify that the placement is intended to restrict the conservatee, not merely make him or her more secure.

Noncompliance with Probate Code sections 811 and 2356.5

Probate Code section 811, part of the Due Process in Competency Determinations Act (DPCDA),[2] provides that a determination that a person lacks the capacity to make a decision or perform an act must be supported by evidence of one or more deficits in the person's mental functions and evidence of a correlation between the deficit or deficits and the decision or act in question. Section 811(b) provides that a deficit in a person's mental functions may be considered only if it, alone or in combination with other deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the decision or act in question. The mental functions are listed in section 811(a).

Probate Code section 2356.5 defines "dementia powers" and places substantial limits on their exercise. Section 2356.5(b) and (b)(2) and section 2356.5(c) and (c)(2) authorize a conservator to place a conservatee in a secured-perimeter residential care facility for the elderly or administer psychotropic medications for dementia only if the court finds, by clear and convincing evidence, that the conservatee lacks the capacity to give informed consent to the placement or the medication, has at least one mental function deficit under section 811,[3] and that this deficit significantly impairs the conservatee's ability to

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[1] The quoted language is taken directly from the statute that defines the authorized facility, Health and Safety Code section 1569.698, cited in Probate Code section 2356.5(b). See the discussion at pages 8 and 9.

[2] Stats.1995, ch. 842, § 12.

[3] Section 2356.5(b)(2) refers to Probate Code section 812. This reference is incorrect. The intended reference is to the mental functions identified in section 811. When the DPCDA was enacted in 1995, the contents of present section 811 were placed in section 812 and the contents of present section 812 were placed in section 811. The original sections 811 and 812 were repealed and reenacted in their present configurations in 1996. (Stats.1996, ch. 178, §§ 2–5.) Although section 2356.5 was enacted in 1996 (Stats.1996, ch. 910, § 1), the changes in sections 811 and 812 that had been made earlier during that

understand and appreciate the consequences of his or her decisions—consenting or failing to consent to placement in a restricted-egress facility or administration of dementia medication.

Existing form GC-335 does not comply with these statutes in the following respects:

1. Form GC-335 requests no evidence that a deficit in a conservatee's mental functions identified in item 6 of the form correlates with the decisions required of a conservatee concerning placement in a secured-perimeter facility or administration of psychotropic medications, or that the deficit significantly impairs the conservatee's ability to understand the consequences of those decisions.

This issue is addressed by requiring the medical expert declarant to specifically identify the deficits in a conservatee's mental functions that significantly impair his or her ability to understand and appreciate the consequences of those decisions. See proposed new form GC-335A, items 9a(2) and (4) and 9b(2) and 9b(4).

2. Form GC-335 requests no evidence that the proposed placement of the conservatee in a secured-perimeter facility is the least restrictive placement appropriate to the needs of the conservatee.

Under Probate Code section 2356.5(b) and (b)(4), the court may authorize the conservatee's placement in a locked facility only if it makes a finding supported by substantial evidence that the placement is the least restrictive appropriate to the needs of the conservatee. Item 8 on page 3 of existing form GC-335 is silent on this issue. In uncontested cases where there will be no trial, the form declaration is likely to be the only source of evidence on the issue.

The advisory committee proposes to add item 9a(5) to form GC-335A to supply the expert medical declarant's opinion as evidence in support of the required finding.

3. Item 8a of form GC-335 refers to a "secured nursing facility that specializes in the care and treatment of persons with dementia."

Probate Code section 2356.5(b) describes two types of facilities where (proposed) conservatees may be placed. The statute cites Health and Safety Code sections 1569.691 and 1569.698 as authority for these facilities. The language quoted above identifies a facility authorized by Health and Safety Code section 1569.691, a statute that was

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same legislative session were carried over to the new statute. Section 2356.5's reference to section 812 has never been corrected.

repealed in 1995, effective on January 1, 1998.[4] The advisory committee proposes to delete this language from revised item 9a of form GC-335A, and to identify the authorized facility in the instructions to that item as a "secured-perimeter residential care facility for the elderly." That is the facility described in Health and Safety Code section 1569.698, a statute that remains in effect.[5]

Changes in the forms' manner of execution
Form GC-335 must now be signed at the bottom of page 3, and all three pages must be filed even when the form is used only to support a proposed conservatee's absence from court for the hearing on appointment of a conservator. All of the information necessary for that use is contained on page 1 of the existing form except for the declarant's signature on page 3. Pages 2 and 3 are otherwise left blank in that situation, although they must be filed.

The advisory committee proposes to change the way forms GC-335 and GC-335A may be signed and filed. The committee first proposes to add a signature line at the bottom of page 1 of form GC-335. If that form is used solely to support a proposed conservatee's absence from the hearing on the petition for appointment of a conservator, the declarant would be required to sign at the bottom of page 1 and only that page would have to be filed.

If form GC-335 is used for either or both of the other authorized purposes, the (proposed) conservatee's mental functions must be evaluated in item 6 of the form. Either item 7 of revised form GC-335 or item 9 of new form GC-335A would also have to be completed, depending on whether the declarant is supporting an application for exclusive authority to consent to the (proposed) conservatee's medical treatment (item 7 of GC-335) or an application for dementia powers (item 9 of form GC-335A).

If the form is used to support a request for exclusive authority to consent to the conservatee's medical treatment, all three pages of form GC-335 would be completed (excepting item 5 on page 1), the declarant would be required to sign at the bottom of page 3, and all three pages of the form would be filed. If used to support dementia powers, all three pages of revised form GC-335 would be completed (excepting items 5

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[4] Stats.1995, ch. 550, § 1. This repeal was the reason why the Judicial Council revised related form GC-313, *Attachment Requesting Special Orders Regarding Dementia*, by deleting the identical language and a reference to the repealed code section. The revision was effective January 1, 2003.

It is clear that the facility described in former Health and Safety Code section 1569.691 is no longer an authorized involuntary placement for conservatees suffering from dementia although Probate Code section 2356.5(b) has not been amended to delete references to the repealed code section or to the facility described in it.

[5] The regulation cited in the statute, California Code of Regulations, title 22, section 87724, also remains in effect.

and 7 on page 3), new form GC-335A would also be completed, and all three pages of GC-335 would be filed with form GC-335A as an attachment. The forms have been designed to permit the medical declarant to sign only at the bottom of form GC-335A whenever that form is used.

The new and revised forms have been designed to cover situations where they are used for two or all three of the forms' authorized purposes. If form GC-335 is used to excuse the proposed conservatee's absence from the hearing on appointment of a conservator and to support a request for exclusive authority to consent to medical treatment, the medical expert declarant would need to sign only at the bottom of page 3. If forms GC-335 and GC-335A are used to support the grant of dementia powers and either or both of the other authorized purposes, all three pages of form GC-335 would be filed together with form GC-335A, and the declarant would be required to sign only at the bottom of form GC-335A.

The instructions for completion and execution of both forms at the top of page 1 of form GC-335 cover all authorized uses of the forms.

Other changes in form GC-335

Two additional changes in form GC-335 are recommended by the advisory committee. First, item 6B(1) on page 2, part of the evaluation of the (proposed) conservatee's mental functions required by the DPCDA, would be revised to require separate evaluations of short-term, long-term and immediate-recall memory. This change is prompted by Probate Code section 811(a)(2)(A), which requires evaluation of all three forms of memory. Existing form GC-335 has only one place for an evaluation of memory, but its instructions ask the declarant to evaluate all three kinds of memory in that single place. This does not permit the declarant to note differences in observed deficits between the three types of memory.

Second, the committee proposes to delete the checkboxes above or in the first line of items 5, 6, and 7 of form GC-335 and item 9 of form GC-335A. The advisory committee believes that these boxes, which indicate that the items are applicable, are unnecessary because the instructions on page 1 of form GC-335 explain when each of these items should be completed.

<u>Alternative Actions Considered</u>

No alternatives to a revision of form GC-335 were considered. Many of the changes proposed are required to comply with current law. The advisory committee did consider retaining the material on dementia powers in revised form GC-335 rather than placing it in new form GC-335A. This alternative was rejected because the committee concluded that placement of this material in a separate form would enhance the goal of requiring a more thoughtful and considered analysis of the need to request dementia powers and thereby reduce the number of unnecessary or inappropriate applications.

Comments From Interested Parties

These proposals were circulated to an expanded list of probate practitioners, private professional conservators, and probate law sections of local bar associations in addition to the AOC's standard mailing list of court executives, judges, and other interested persons and organizations, including the Trusts and Estates Section of the California State Bar.

Seven comments were received from the public concerning the revised and new forms, five approving if the forms are modified, one disapproving, and one approving. A chart showing these comments and the advisory committee's responses is attached at pages 23–32.

Several commentators expressed their view that the forms would be more difficult for physicians to complete and, therefore, likely to result in reduced cooperation by physicians or increased expense to attorneys, their conservator clients, and, ultimately, the estates of conservatees. The advisory committee believes that these proposals would give increased protection to conservatees against unnecessary or inappropriate applications for the extraordinary powers involved. The committee is concerned that many conservators routinely ask for dementia powers where they are not needed and that medical declarants may now execute form GC-335 without a clear understanding of the consequences, particularly regarding placement of the conservatee in a "secure" facility.

These proposals would support a stated purpose of Probate Code section 2356.5 to "safeguard the basic dignity and rights of the conservatee."[6] The committee believes that support of this statutory purpose outweighs any temporary increased difficulty that declarants or conservators or their attorneys may have in completing the forms, and that any reduced level of cooperation by medical expert declarants or increased costs will be temporary.[7]

Professional conservator Emily Stuhlbarg reported confusion concerning items 9a(3) and (4) and 9b(3) and (4) of proposed new form GC-335A as it was circulated for comment.

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[6] See Prob. Code, § 2356.5(a)(1).

[7] The revised form GC-335 and the new form GC-335A are based on a local court form developed by the Santa Clara County Bar Association and used for several years in the superior court in that county. That form requires more attention and effort by medical declarants than the existing form GC-335, but its supporters—including an advisory committee member from Santa Clara County who participated in the local form's creation and implementation—report no significant difficulty in obtaining physicians' cooperation. The Santa Clara County experience was that difficulties with the local form declined as attorneys and medical declarants became accustomed to it. The advisory committee believes that in the long run, if the new and revised forms result in fewer inappropriate applications for extraordinary powers, the overall cost of time or money to attorneys, physicians, conservators, conservatees, and the courts will diminish.

These items were intended to provide expert opinion evidence to support the findings that the court must make under Probate Code section 2356.5(b) and (c) to support the grant of dementia powers.[8]

Although Ms. Stuhlbarg did not make any specific recommendations on how to clarify those items, the advisory committee agreed with the general thrust of her comments and modified form GC-335A as follows:

1. Items 9a(3) and 9b(3) of form GC-335A as it was circulated for comment asked the declarant to state opinion evidence in support of the required findings noted above, but also asked the declarant to complete check boxes indicating that the conservatee does or does not have capacity to give informed consent. If the declarant checks the "does" box for either item, the opinion evidence stated in that item cannot be true.

These items have been modified to request opinion evidence of an impairing deficit in mental function only if the declarant opines that the (proposed) conservatee does not have capacity. This was accomplished by placing the statements that the conservatee has or does not have capacity in separate paragraphs (3) and (4), respectively, and renumbering the former paragraphs 9a(4) and 9b(4) as 9a(5) and 9b(5).

2. Item 9a(4) of form GC-335A as it was circulated for comment asked the declarant to state that the locked or secured-perimeter facility where the (proposed)

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[8] Probate Code section 2356.5 provides in material part:

> (b) . . . [U]pon a court's finding, by clear and convincing evidence, of all of the following:
> . . .
> (2) The conservatee lacks the capacity to give informed consent to . . . placement [in a secured residential care facility] and has at least one mental function deficit pursuant to subdivision (a) of [Prob. Code] Section [811], and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of Section [811].
> (3) The conservatee needs or would benefit from a restricted and secure environment, as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).
>
> (c) . . . [U]pon a court's finding, by clear and convincing evidence, of all of the following:
> . . .
> (2) The conservatee lacks the capacity to give informed consent to the administration of medications appropriate to the care of dementia, and has at least one mental function deficit pursuant to subdivision (a) of [Prob. Code] Section [811], and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of Section [811].
> (3) The conservatee needs or would benefit from appropriate medication as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

conservatee would be placed is or is not the least restrictive environment for the (proposed) conservatee.

The question was confusing because this type of facility is always the *most* restrictive facility authorized under the law for the conservatee's placement. The question was intended to require the declarant to state that the facility is or is not the least restrictive facility *appropriate to the needs of the (proposed) conservatee*.

The advisory committee made this change. The modified language exactly follows the required statutory finding under Probate Code section 2356.5(b)(4). It is found in item 9a(5) of the revised form.

Ms. Stuhlbarg also questioned whether the opinion evidence statement in item 9a(4) of form GC-335A as it was circulated for comment (item 9a(5) in the revised version proposed by the advisory committee) can be made on initial assessment. The committee disagrees with this comment because the statement is the expert medical opinion of the declarant, which is evidence and may be the only evidence in support of the court's finding if there is no trial in an uncontested proceeding.

Ms. Sandra Riley, the supervising probate attorney in the Superior Court, County of Los Angeles, is the only commentator who expressed overall disapproval of the proposed revisions of form GC-335, because medical declarants will have to spend more time completing the form and because in some circumstances multiple declarations may be required.[9]

Ms. Riley also recommended that a statement should be added to form GC-335 advising medical declarants of the provisions of Evidence Code sections 1004 and 1005. These sections create exceptions to the physician-patient privilege in proceedings to place a patient under the control of another because of the mental or physical condition of the patient (section 1004), or in proceedings brought by the patient to establish the patient's competency (section 1005). Ms. Riley believes that this statement would encourage declarants to complete the forms.

The advisory committee disagrees with this proposal. The cited Evidence Code sections provide exceptions only to the physician-patient privilege, not to the psychotherapist-patient privilege under Evidence Code sections 1010–1027. Some psychologists—included in the definition of "psychotherapists" under Evidence Code section 1010—may also sign the form. There is no analogue to Evidence Code section 1004 applicable to psychotherapists under sections 1010–1027. The statement recommended by Ms. Riley

[9] The advisory committee's response to this last point is to note that in the situation described by Ms. Riley, multiple declarations would be required if the existing form remains unchanged.

might mislead psychologists to believe that the exception provided in section 1004 applies to them.

A second reason the advisory committee disagrees with Ms. Riley's suggestion concerns the effect of regulations recently adopted under the Public Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[10] These regulations may have a significant impact on the ability of medical doctors and psychologists to testify about the mental or physical condition of proposed conservatees, in live testimony or in declarations like form GC-335, before a court appoints a conservator with authority to waive evidentiary privileges on behalf of the conservatee or before a court can compel their testimony.

This advisory committee currently is considering the impact of the federal regulations under HIPAA on conservatorship proceedings generally. Until that review is concluded, the committee believes that a broad statement intended to assure potential declarants that evidentiary privileges available to patients of physicians or psychologists are subject to exceptions in conservatorship proceedings might mislead declarants to believe that confidentiality issues raised by the HIPAA regulations have been resolved in favor of testimony.

Other commentators requested that the forms be made confidential, in part because of HIPAA's possible impact. However, the Judicial Council cannot make a form confidential without statutory or at least rule-of-court authority. The advisory committee believes that any rule of court on this topic should be circulated for public comment before adoption.

The advisory committee recommends that the proposed revisions to form GC-335 and the adoption of form GC-335A proceed while the committee evaluates the impact of HIPAA and considers whether to recommend adoption of one or more rules of court or Judicial Council sponsorship or support of legislation to make these forms confidential.

Implementation Requirements and Costs

Proposed conservators, their attorneys, and the estates of conservatees may expect the cost of using these forms to increase because of the additional time and effort that medical expert declarants will have to spend and the increased fees they will charge for this activity. As doctors or psychologists and attorneys become more used to the forms, these additional costs should diminish. Over time the number of applications for the extraordinary powers involved should diminish, at an overall savings to the courts and to persons coming before the courts in conservatorship matters.

[10] Pub. L. No. 104–191 (August 21, 1996) 110 Stat. 2024. The regulations are located at 45 Code of Federal Regulations section 164.102 et seq. They became effective on April 15, 2003.

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2004:

1. Revise form GC-335 to:
    a. Permit filing of page 1 only when the form is used solely to excuse a proposed conservatee's absence from the hearing on the appointment of a conservator;
    b. Revise item 6B(1) on page 2 to provide for separate assessments of a (proposed) conservatee's short-term, long-term, and immediate-recall memory;
    c. Provide a place for the initials of an authorized medical expert declarant below item 7 at page 3 of the form, to confirm the declarant's conclusion that the (proposed) conservatee lacks the capacity to give informed consent to any form of medical treatment; and
    d. Remove the material concerning dementia powers in item 8 on page 3.
2. Adopt form 335A, *Dementia Attachment to Capacity Declaration—Conservatorship* to receive the material concerning dementia powers that has been removed from item 8 of form GC-335, redesignated as item 9, and revised to:
    a. Replace the description of authorized placements of patients suffering from dementia in former item 8a with the phrase "secured-perimeter residential care facility for the elderly" in the instructions for item 9a, and thereafter as "restricted and secure" or "locked or secured-perimeter facility" in item 9a;
    b. Require the medical expert declarant to provide detailed information on the (proposed) conservatee's condition and the reasons for his or her placement in a restricted and secure facility or the administration of psychotropic medication;
    c. Require the medical expert declarant to specifically identify the deficits in the (proposed) conservatee's mental functions that impair his or her ability to appreciate or understand the consequences of giving or withholding consent to placement in a restricted and secure environment or administration of psychotropic medications for the treatment of dementia;

Revised form GC-335 is attached at pages 16–18. New form GC-335A is attached at page 19. A copy of current form GC-335 is attached for information purposes at pages 20–22.

Attachments

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	**Draft 12** **10/01/03**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	
CAPACITY DECLARATION—CONSERVATORSHIP	CASE NUMBER

TO PHYSICIAN, PSYCHOLOGIST, OR RELIGIOUS HEALING PRACTITIONER

The purpose of this form is to enable the court to determine whether the (proposed) conservatee *(check all that apply):*

A. ☐ is able to attend a court hearing to determine whether a conservator should be appointed to care for him or her. The court hearing is set for *(date):* ☐ *(Complete item 5, sign, and file page 1 of this form.)*

B. ☐ has the capacity to give informed consent to medical treatment. *(Complete items 6 through 8, sign page 3, and file pages 1 through 3 of this form.)*

C. ☐ has dementia and, if so, (1) whether he or she needs to be placed in a secured-perimeter residential care facility for the elderly, and (2) whether he or she needs or would benefit from dementia medications. *(Complete items 6 and 8 of this form and form GC-335A; sign and attach form GC-335A. File pages 1 through 3 of this form and form GC-335A.)*

(*If more than one item is checked above, sign the last applicable page of this form or form GC-335A if item C is checked. File page 1 through the last applicable page of this form; also file form GC-335A if item C is checked.)*

COMPLETE ITEMS 1–4 OF THIS FORM IN ALL CASES.

GENERAL INFORMATION

1. *(Name):*
2. *(Office address and telephone number):*
3. I am
   a. ☐ a California licensed ☐ physician ☐ psychologist acting within the scope of my licensure ☐ with at least two years' experience in diagnosing dementia.
   b. ☐ an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the (proposed) conservatee. The (proposed) conservatee is under my treatment. *(Religious practitioner may make the determination under item 5 ONLY.)*
4. (Proposed) conservatee *(name):*
   a. I last saw the (proposed) conservatee on *(date):*
   b. The (proposed) conservatee ☐ is ☐ is NOT a patient under my continuing treatment.

ABILITY TO ATTEND COURT HEARING

5. A court hearing on the petition for appointment of a conservator is set for the date indicated in item A above. *(Complete a or b.)*
   a. ☐ The proposed conservatee is able to attend the court hearing.
   b. ☐ Because of medical inability, the proposed conservatee is NOT able to attend the court hearing *(check all items below that apply)*
      (1) ☐ on the date set *(see date in box in item A above)*.
      (2) ☐ for the foreseeable future.
      (3) ☐ until *(date):*
      (4) **Supporting facts** *(State facts in the space below or check this box* ☐ *and state the facts in Attachment 5):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
GC-335 [Rev. January 1, 2004]

Probate Code, §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*:	CASE NUMBER:
☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	

6. EVALUATION OF (PROPOSED) CONSERVATEE'S MENTAL FUNCTIONS

Note to practitioner: This form is ***not*** a rating scale. It is intended to assist you in recording your *impressions* of the (proposed) conservatee's mental abilities. Where appropriate, you may refer to scores on standardized rating instruments.

(Instructions for items 6A–6C): *Check the appropriate designation as follows:* ***a*** *= no apparent impairment;* ***b*** *= moderate impairment;* ***c*** *= major impairment;* ***d*** *= so impaired as to be incapable of being assessed;* ***e*** *= I have no opinion.)*

A. **Alertness and attention**

(1) Levels of arousal (lethargic, responds only to vigorous and persistent stimulation, stupor)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Orientation (types of orientation impaired)
a ☐ b ☐ c ☐ d ☐ e ☐ Person
a ☐ b ☐ c ☐ d ☐ e ☐ Time (day, date, month, season, year)
a ☐ b ☐ c ☐ d ☐ e ☐ Place (address, town, state)
a ☐ b ☐ c ☐ d ☐ e ☐ Situation ("Why am I here?")

(3) Ability to attend and concentrate (give detailed answers from memory, mental ability required to thread a needle)
a ☐ b ☐ c ☐ d ☐ e ☐

B. **Information processing.** Ability to:

(1) Remember (ability to remember a question before answering; to recall names, relatives, past presidents, and events of the past 24 hours)
i. Short-term memory a ☐ b ☐ c ☐ d ☐ e ☐
ii Long-term memory a ☐ b ☐ c ☐ d ☐ e ☐
iii Immediate recall a ☐ b ☐ c ☐ d ☐ e ☐

(2) Understand and communicate either verbally or otherwise (deficits reflected by inability to comprehend questions, follow instructions, use words correctly, or name objects; use of nonsense words)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Recognize familiar objects and persons (deficits reflected by inability to recognize familiar faces, objects, etc.)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Understand and appreciate quantities (deficits reflected by inability to perform simple calculations)
a ☐ b ☐ c ☐ d ☐ e ☐

(5) Reason using abstract concepts. (deficits reflected by inability to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs)
a ☐ b ☐ c ☐ d ☐ e ☐

(6) Plan, organize, and carry out actions (assuming physical ability) in one's own rational self-interest (deficits reflected by inability to break complex tasks down into simple steps and carry them out)
a ☐ b ☐ c ☐ d ☐ e ☐

(7) Reason logically.
a ☐ b ☐ c ☐ d ☐ e ☐

C. **Thought disorders**

(1) Severely disorganized thinking (rambling thoughts; nonsensical, incoherent, or nonlinear thinking)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Hallucinations (auditory, visual, olfactory)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Delusions (demonstrably false belief maintained without or against reason or evidence)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Uncontrollable or intrusive thoughts (unwanted compulsive thoughts, compulsive behavior).
a ☐ b ☐ c ☐ d ☐ e ☐

(Continued on next page)

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

6. *(continued)*

D. **Ability to modulate mood and affect.** The (proposed) conservatee ☐ has ☐ does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his or her circumstances. *(If so, complete remainder of item 6D.)* ☐ I have no opinion.

***(Instructions for item 6D:** Check the degree of impairment of each inappropriate mood state (if any) as follows: **a** = mildly inappropriate; **b** = moderately inappropriate; **c** = severely inappropriate.)*

Anger	a ☐	b ☐	c ☐	Euphoria	a ☐	b ☐	c ☐	Helplessness	a ☐	b ☐	c ☐
Anxiety	a ☐	b ☐	c ☐	Depression	a ☐	b ☐	c ☐	Apathy	a ☐	b ☐	c ☐
Fear	a ☐	b ☐	c ☐	Hopelessness	a ☐	b ☐	c ☐	Indifference	a ☐	b ☐	c ☐
Panic	a ☐	b ☐	c ☐	Despair	a ☐	b ☐	c ☐				

E. The (proposed) conservatee's periods of impairment from the deficits indicated in items 6A–6D

(1) ☐ do NOT vary substantially in frequency, severity, or duration.

(2) ☐ do vary substantially in frequency, severity, or duration *(explain; continue on Attachment 6E if necessary):*

F. ☐ *(Optional)* Other information regarding my evaluation of the (proposed) conservatee's mental function (e.g., diagnosis, symptomatology, and other impressions) is ☐ stated below ☐ stated in Attachment 6F.

ABILITY TO CONSENT TO MEDICAL TREATMENT

7. Based on the information above, it is my opinion that the (proposed) conservatee

a. ☐ has the capacity to give informed consent to any form of medical treatment. This opinion is limited to medical consent capacity.

b. ☐ lacks the capacity to give informed consent to any form of medical treatment because he or she is ***either*** (1) unable to respond knowingly and intelligently regarding medical treatment ***or*** (2) unable to participate in a treatment decision by means of a rational thought process, ***or both***. The deficits in the mental functions described in item 6 above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of medical decisions. This opinion is limited to medical consent capacity.

(Declarant must initial here if item 7b applies: _____.)

8. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

GC–335A

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

ATTACHMENT TO FORM GC-335, *CAPACITY DECLARATION—CONSERVATORSHIP,* ONLY FOR (PROPOSED) CONSERVATEE WITH DEMENTIA

9. It is my opinion that the (proposed) conservatee ☐ HAS ☐ does NOT have dementia as defined in the current edition of *Diagnostic and Statistical Manual of Mental Disorders*.

   a. ☐ **Placement of (proposed) conservatee.** *(If the (proposed) conservatee requires placement in a secured-perimeter residential care facility for the elderly, please complete items 9a(1)–9a(5).)*

      (1) The (proposed) conservatee needs or would benefit from placement in a restricted and secure facility because *(state reasons; continue on Attachment 9a(1) if necessary):*

      (2) The (proposed) conservatee's mental function deficits, based on my assessment in item 6 of form GC-335, include *(describe; continue on Attachment 9a(2) if necessary):*

      (3) ☐ The (proposed) conservatee HAS capacity to give informed consent to this placement.

      (4) ☐ The (proposed) conservatee does NOT have capacity to give informed consent to this placement. The deficits in mental function assessed in item 6 of form GC-335 and described in item 9a(2) above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of his or her actions with regard to giving informed consent to placement in a restricted and secure environment.

      (5) A locked or secured-perimeter facility ☐ is ☐ is NOT the least restrictive environment appropriate to the needs of the (proposed) conservatee.

   b. ☐ **Administration of dementia medications**. *(If the (proposed) conservatee requires administration of psychotropic medications appropriate to the care of dementia, please complete items 9b(1)–9b(5).)*

      (1) The (proposed) conservatee needs or would benefit from the following psychotropic medications appropriate to the care of dementia, for the reasons stated in item 9b(5) *(list medications; continue on Attachment 9b(1) if necessary):*

      (2) The (proposed) conservatee's mental function deficits, based on my assessment in item 6 of form GC-335, include *(describe; continue on Attachment 9b(2) if necessary):*

      (3) ☐ The (proposed) conservatee HAS capacity to give informed consent to the administration of psychotropic medications appropriate to the care of dementia.

      (4) ☐ The (proposed) conservatee does NOT have the capacity to give informed consent to the administration of psychotropic medications appropriate to the care of dementia. The deficits in mental function assessed in item 6 of form GC-335 and described in item 9b(2) above significantly impair the (proposed) conservatee's ability to understand and appreciate his or her actions with regard to giving informed consent to the administration of psychotropic medications for the treatment of dementia.

      (5) The (proposed) conservatee needs or would benefit from the administration of the psychotropic medications listed in item 9b(1) because *(state reasons; continue on Attachment 9b(5) if necessary):*

10. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
GC–335A [New January 1, 2004]

DEMENTIA ATTACHMENT TO CAPACITY DECLARATION—CONSERVATORSHIP

Probate Code, § 2356.5

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	
CAPACITY DECLARATION—CONSERVATORSHIP	CASE NUMBER:

TO PHYSICIAN, PSYCHOLOGIST, OR PRACTITIONER

The purpose of this form is to enable the court to determine whether your patient

A. ☐ is able to attend a court hearing to determine whether a conservator should be appointed to care for him or her. The court hearing is set for *(date)*: ☐ *(Complete item 5).*

B. ☐ has the capacity to give informed consent to medical treatment. *(Complete items 6 and 7.)*

C. ☐ has dementia and, if so, (1) whether he or she needs to be placed in a secured facility for the elderly or a facility that provides dementia treatment and (2) whether he or she needs or would benefit from dementia medications. *(Complete items 6 and 8.)*

COMPLETE ITEMS 1–4 IN ALL CASES.

GENERAL INFORMATION

1. *(Name)*:

2. *(Office address and telephone number)*:

3. I am
   a. ☐ a California licensed ☐ physician ☐ psychologist acting within the scope of my licensure ☐ with at least two years' experience in diagnosing dementia.
   b. ☐ an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the patient. The patient is under my treatment. *(Practitioner may make the determination under item 5 ONLY.)*

4. Patient *(name)*:
   a. I last examined the patient on *(date)*:
   b. The patient ☐ is ☐ is NOT under my continuing treatment.

☐ ABILITY TO ATTEND COURT HEARING

5. A court hearing on the petition for appointment of a conservator is set for the date indicated in item A above. *(Complete a or b.)*
   a. ☐ The patient is able to attend the court hearing.
   b. ☐ Because of medical inability, the patient is NOT able to attend the court hearing *(check all items below that apply)*
      (1) ☐ on the date set *(see date in box in item A above).*
      (2) ☐ for the foreseeable future.
      (3) ☐ until *(date)*:
      Supporting facts *(State facts in the space below or check this box* ☐ *and state the facts in an attachment marked "Attachment 5")*:

(Continued on reverse)

Form Approved by the Judicial Council of California
GC-335 [New July 1, 1998]
Mandatory Form [1/1/2000]

WEST GROUP
Official Publisher

Probate Code, §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5

CONSERVATORSHIP OF *(Name)*:	CASE NUMBER:
☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	

☐ EVALUATION OF PATIENT'S MENTAL FUNCTION

6. **Note to the medical practitioner:** This form is *not* a rating scale. It is intended to assist you in recording your *impressions* of the patient's mental abilities. Where appropriate, please feel free to refer to scores on standardized rating instruments.

Instructions (items A–C): Check the appropriate designation as follows: ***a*** = no apparent impairment; ***b*** = moderate impairment; ***c*** = major impairment; ***d*** = so impaired as to be incapable of being assessed; ***e*** = I have no opinion.

A. **Alertness and attention**

(1) Levels of arousal (lethargic, responds only to vigorous and persistent stimulation, stupor)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Orientation (types of orientation impaired)
a ☐ b ☐ c ☐ d ☐ e ☐ Person
a ☐ b ☐ c ☐ d ☐ e ☐ Time (day, date, month, season, year)
a ☐ b ☐ c ☐ d ☐ e ☐ Place (address, town, state)
a ☐ b ☐ c ☐ d ☐ e ☐ Situation ("Why am I here?")

(3) Ability to attend and concentrate (ability to give detailed answers from memory, mental ability required to thread a needle)
a ☐ b ☐ c ☐ d ☐ e ☐

B. **Information processing** Ability to

(1) Remember, that is, short- and long-term memory, immediate recall (deficits reflected by forgetting question before answering; inability to recall names, relatives, past presidents, or events of past 24 hours)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Understand and communicate either verbally or otherwise (deficits reflected by inability to comprehend questions, follow instructions, use words correctly, or name objects; use of nonsense words)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Recognize familiar objects and persons (deficits reflected by inability to recognize familiar faces, objects, etc.)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Understand and appreciate quantities (deficits reflected by inability to perform simple calculations)
a ☐ b ☐ c ☐ d ☐ e ☐

(5) Reason using abstract concepts (deficits reflected by inability to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs)
a ☐ b ☐ c ☐ d ☐ e ☐

(6) Plan, organize, and carry out actions (assuming physical ability) in one's own rational self-interest (deficits reflected by inability to break complex tasks down into simple steps and carry them out)
a ☐ b ☐ c ☐ d ☐ e ☐

(7) Reason logically
a ☐ b ☐ c ☐ d ☐ e ☐

C. **Thought disorders**

(1) Severely disorganized thinking (rambling thoughts; nonsensical, incoherent, or nonlinear thinking)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Hallucinations (auditory, visual, olfactory)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Delusions (demonstrably false belief maintained without or against reason or evidence)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Uncontrollable or intrusive thoughts (unwanted compulsive thoughts, compulsive behavior)
a ☐ b ☐ c ☐ d ☐ e ☐

D. **Ability to modulate mood and affect** The patient ☐ has ☐ does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his or her circumstances. *(If so, complete remainder of 6D.)*
☐ I have no opinion.

Instructions (item D): Check the *degree* of impairment of each *inappropriate* mood state *(if any)* as follows: ***a*** = mildly inappropriate; ***b*** = moderately inappropriate; ***c*** = severely inappropriate.

Anger	a ☐	b ☐	c ☐	Euphoria	a ☐	b ☐	c ☐	Helplessness	a ☐	b ☐	c ☐
Anxiety	a ☐	b ☐	c ☐	Depression	a ☐	b ☐	c ☐	Apathy	a ☐	b ☐	c ☐
Fear	a ☐	b ☐	c ☐	Hopelessness	a ☐	b ☐	c ☐	Indifference	a ☐	b ☐	c ☐
Panic	a ☐	b ☐	c ☐	Despair	a ☐	b ☐	c ☐				

(Continued on next page)

CONSERVATORSHIP OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

6. *(continued)*
   E. The patient's periods of impairment from the deficits indicated in items 6A–6D
      (1) ☐ do NOT vary substantially in frequency, severity, or duration.
      (2) ☐ do vary substantially in frequency, severity, or duration *(explain)*:

   F. ☐ *(Optional)* Other information regarding my evaluation of the patient's mental function (e.g., diagnosis, symptomatology, and other impressions) *(specify)*:

      ☐ Stated in Attachment 6F.

☐ **ABILITY TO CONSENT TO MEDICAL TREATMENT**

7. Based on the information above, it is my opinion that the patient
   a. ☐ has the capacity to give informed consent to any form of medical treatment. The opinion expressed in item 7a is limited to medical consent capacity.
   b. ☐ lacks the capacity to give informed consent to any form of medical treatment because the patient is ***either*** (1) unable to respond knowingly and intelligently regarding medical treatment ***or*** (2) unable to participate in a treatment decision by means of a rational thought process, ***or both***. The deficits in the mental functions described above significantly impair the patient's ability to understand and appreciate the consequences of medical decisions. The opinion expressed in item 7b is limited to medical consent capacity.

☐ **DEMENTIA**

8. Based on the information above, it is my opinion that the patient ☐ has ☐ does NOT have dementia as defined in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders. (If the patient has dementia, complete items 8a and 8b.)*
   a. **Restricted placement** The patient ☐ needs or would benefit from ☐ does NOT need or would not benefit from placement in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.
   b. **Dementia medications**
      (1) The patient ☐ needs or would benefit from ☐ does NOT need or would not benefit from medications appropriate to the care and treatment of dementia.
      (2) The patient ☐ does ☐ does NOT lack capacity to give informed consent to the administration of dementia medications.

9. Number of pages attached: ____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
1.	Ms. Claudia Archer Court Services Program Manager—Family Law, Probate, Adoption, and Juvenile Superior Court of California, County of Solano	AM	N	The Court Investigators' comments on this amended form are that they like the changes, but would make the following observations: 1. In the box addressed to "Physician, Psychologist, or Religious Healing Practitioner," move the instruction "Complete Items 1–4 of this form in all cases" to the top of the next box. 2. Under Item 5, Supporting Facts, remove the words "State facts in the box below or." 3. Delete 9(a)(2) and 9(b)(2) [of form GC-335A]. The court investigators have experienced difficulty in getting physicians to complete this form—adding these sections appears to be a duplication of Item 6, making it even more difficult to get physicians to complete the requested information.	1. The advisory committee disagrees with this comment. The text box contains all of the other instructions for completing the required items in the form; this basic instruction should remain there. 2. The advisory committee has addressed the issue raised by this comment by providing more room for supporting facts to be placed in item 5 of the form so that an attachment 5 may be unnecessary in many cases. 3. Item 6 of form GC-335 contains an overall evaluation of the conservatee's mental functions. However, that evaluation does not connect a mental function deficit to a particular capacity. Items 9a(2) and 9b(2) of form GC-335A require the declarant to identify the conservatee's mental functions that are deficient and actually affect the specific capacity in question. This is required under the law. (See Prob. Code, §§ 811(b) and 2356.5(b)(2) and (c)(2).)

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
					The changes in form GC-335 are based on a local form that has been used in Santa Clara County for several years. That form requires a degree of specificity and detail similar to these proposed revised and new forms. Supporters of the Santa Clara form do not report a significant problem getting physicians to complete that form.
2.	Ms. Harlean Carroll Probate Attorney Superior Court of California, County of Los Angeles	AM	N	GC 335 (changed) and GC-335A (new)—(1) At the outset I think that this form should be confidential, even more so now that the new HIPAA law is in effect; (2) I think the current form alone with some changes, i.e., to give more instruction to the declarant relating to what is being asked of him or her, to the seriousness of the rights being affected, and to the need to know the basis upon which the recommendations are made, and perhaps, requiring initials at the end of each area requested of the	1. The advisory committee does not believe it has the authority to make a form confidential without statutory authority, or at least the authority of a rule of court. The advisory committee is studying the impact of HIPAA on conservatorships generally and may make recommendations for statutory or rule changes. However, the committee believes the revisions in form GC-335 and new form GC-335A should go forward at this time. 2. Revised form GC-335 will require the declarant's initials only once, in item 7, when the declarant opines that the conservatee does not have capacity to give consent to medical treatment. However, the new form GC-335A will require the declarant to affirmatively

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
				declarant is a practical resolution. (3) while obtaining more medical input to a primarily medical problem in many cases is a great idea, it can and will drive up the costs of an already expensive proceeding, and it most probably will increase the time in obtaining an appointment of conservator;	answer (by checkboxes) the fundamental questions about the conservatee's dementia and capacity, and to make specific factual allegations concerning the conservatee's need for a restricted living environment or for dementia medications. This greater degree of specificity and affirmative duty to respond should be sufficient without additional places for the declarant's initials. 3. The advisory committee recognizes that the revised and new forms may take more time to complete, and may result in increased medical or legal costs. However, the committee believes the greater protection the forms give the conservatee against hasty and unwarranted requests for the extraordinary powers involved justify the extra time and expense. The committee believes that physicians and attorneys will become used to the requirements of the new and revised forms so that the amount of extra time and expense required to complete them should diminish. To the extent that these forms cause fewer unnecessary requests for extraordinary powers they

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
					will actually save time and money for attorneys, conservators, conservatees, medical experts, and courts.
				(4) to separate the dementia portion of the Capacity Declaration from the other portions will make the conservatorship process, which is already paper and time intensive, more complex;	4. The advisory committee believes that placing the dementia material in a separate form will decrease rather than increase complexity. Form GC-335A will be filed only when dementia powers are requested, not every time the form GC-335 is filed, as at present.
				(5) at the current time, we, in Pasadena and Glendale see cases coming to us where the proposed conservatee has been taken from a long-time residence and placed in a geropsychiatric ward of a local hospital under the authority of W&I section 5150; this would indicate that the conservatorship process, specifically PC 2356.5, is not being used as intended, to safeguard the basic dignity and rights of the conservatee; and	5. The revisions in form GC-335 are intended to increase rather than decrease safeguards against deprivations of the conservatee's dignity or rights. These forms cannot address inappropriate placements under the Lanterman-Petris-Short Act. However, the advisory committee would welcome any suggestions for necessary or appropriate changes in that law or in practices under it.
				(6) finally, I think that the role of the court appointed counsel has been overlooked; court appointed counsel can and should delve into the need for the powers requested by the proposed conservator and be the advocate for the proposed conservatee.	6. The revised and new forms should help appointed counsel address the issues raised by this comment and should reduce the number of unnecessary requests for extraordinary powers.

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3.	Mr. Robert Gerard President Orange County Bar Association	AM	Y	Although the changes on the new form 335A may be beneficial for the court in determining evidentiary issues regarding dementia, the form is more difficult for physicians to complete. Attorneys are currently having trouble receiving cooperation from physicians and this new form may make it impossible to get the necessary cooperation. Physicians will either refuse to fill out the form citing time concerns or impose a charge for the service, which is burdensome on the elderly who may not be able to afford it.	The new and revised forms are based on a local form from the Superior Court, County of Santa Clara, designed several years ago by the Santa Clara County Bar Association. Sponsors of the Santa Clara form have not reported significant difficulty in getting physicians or psychologists to cooperate. Their experience was that over time difficulties decreased, as attorneys and medical experts became accustomed to the more stringent Santa Clara form. The advisory committee believes that the same thing will occur after these forms have been used for a period of time. If these proposed changes result in a reduced number of unnecessary or inappropriate requests for dementia powers, the overall costs to the courts, physicians, conservators, attorneys, and the estates of conservatees will decline.
4.	Mr. Stephen Love Executive Officer Superior Court of California, County of San Diego	A	N	Comments were offered to the Committee at the time of drafting the proposed form. However, the entire form may need to be reviewed given the new restrictions placed on physicians by HIPAA effective April 15, 2003. Perhaps corresponding Rules of Court or a form addressing HIPAA requirements for Court Order to disclose patient information would be appropriate.	The advisory committee is studying the effect of HIPAA on conservatorship practice generally. However, the committee believes that the proposed changes in form GC-335 should proceed at this time.

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5.	Ms. Sandra Riley Supervising Probate Attorney Superior Court of California, County of Los Angeles	N	N	Form GC-335—Agree with the comment in the materials, that the medical professional will have to spend more time reading and completing the proposed revised form. In addition, there are many situations where multiple declarations may be required. For example: the court investigator's report discloses that the proposed conservatee is being administered psychotropic medications for the treatment of dementia and it is clear that he or she lacks the capacity to give informed consent to same. The petitioner is not requesting dementia findings or orders and consequently did not provide the physician with the Dementia Attachment. A second Capacity Declaration, with the dementia attachment, must be presented to the physician for completion. This may delay proceedings unnecessarily. In light of HIPAA and doctor's reluctance to share information regarding a patient's medical condition, consideration should be given to modifying the Capacity Declaration to provide for the following:	At present, form GC-335 may be required more than once if used for more than one of its authorized purposes at different times during the conservatorship. The commentator's example is a situation where dementia medications are being administered although the conservator has not requested or received dementia powers. This means that the capacity declaration's dementia item had never been completed even if the declaration form had been filed because it was used for another purpose. Unless the conservator convinces the court that the conservatee has consented to the medications with capacity to do so, a new form declaration will have to be completed and filed in any event. It will include the dementia item, whether as item 8 on the last page of the current form or as item 9 in the new form attachment. The advisory committee is studying the effect of HIPAA on conservatorship practice generally. However, the committee believes that the proposed changes in form GC-335 should proceed at this time. 1. See the response to the comments of

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				1. Make the Capacity Declaration confidential, subject to the same confidentiality limitations that apply to the Court Investigator's Reports, etc. 2. Immediately below the caption of the pleading, the provisions of Evidence Code sections 1004 and 1005 could be stated or paraphrased. This should provide a higher level of comfort to the physician completing the declaration.	Ms. Harlean Carroll above concerning confidentiality. 2. The advisory committee disagrees with this comment for two reasons. a. The effect of the new federal regulations under HIPAA on Evidence Code sections 1004 and 1005 is uncertain at this time. The suggested statement could mislead physicians or psychologists. b. There is no analogue to Evidence Code section 1004 applicable to psychotherapists under Evidence Code sections 1010–1027. Psychologists authorized to execute the form are classified as psychotherapists under the Evidence Code provisions. A statement concerning Evidence Code section 1004 could erroneously imply that psychologists are also covered under that section.
6.	Ms. Emily Stuhlbarg Professional Conservator /	AM	N	In [item] 9a [of form 335A], numbers 3 and 4 are confusing—the same is true with 9b, numbers 3 and	Items 9a(3) and (4) and 9b(3) and (4) of form GC-335A as it circulated for public

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	President Emily Stuhlbarg and Associates, Inc. County of Los Angeles			4. However, I like the idea of separate forms and signatures for each part of a capacity declaration.	comment stated required findings the court must make and that must be supported by clear and convincing evidence. In an uncontested case, that evidence must come from the opinion and other evidence provided by the expert declarant in the capacity declaration forms. See Prob. Code, § 2356.5(b)(2) and (3) and (c)(2) and (3). However, the advisory committee agrees with the comment that items 9a(3) and 9b(3) of form GC-335A as it circulated for comment were confusing, in that the opinion evidence in support of the expert's conclusion that the (proposed) conservatee lacks capacity is stated even if the declarant checks the box indicating that the (proposed) conservatee does *not* lack capacity. The advisory committee has corrected these items by placing the declarant's statement that the conservatee HAS capacity in separate items9a(3) and 9b(3), moving the declarant's statements that the conservatee does not have capacity and the required findings to item 4, and restating items 9a(4) and 9b(4) of the form that was circulated for comment as items 9a(5) and 9b(5).

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					The advisory committee also agrees with the comment that item 9a(4) of form GC-335A (now item 9a(5)) is confusing because it says that the locked or secured-perimeter facility is the least restrictive environment for the (proposed) conservatee, when in fact it is always the most restrictive placement authorized by law. The committee has corrected item 9a(5) to explicitly state what was intended. The locked or secured-perimeter facility is the least restrictive environment *necessary for the appropriate care* of the (proposed) conservatee.
				In [item] 9a, number 4 [of form GC-335A], how can this be determined with an initial assessment? Sometimes trial is necessary.	The advisory committee does not agree with this comment concerning item 9a(4) (now item 9a(5)) of form GC-335A: The court must find that the secured-perimeter facility is the least restrictive environment necessary for the (proposed) conservatee, and this finding must be supported by clear and convincing evidence. In a case where there will be no trial, the expert declarant's opinion in the form declaration that the facility is the least restrictive environment necessary for the (proposed) conservatee's care is itself evidence sufficient to support the finding, especially where the opinion is supported by the declarant's stated reasons why the conservatee needs or would benefit

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					from placement in the facility. (See item 9a(1).) Even where there will be a trial, the declaration will be received in evidence and could supply supporting evidence, subject to cross-examination. (See Prob. Code, § 2356.5(f)(3).)
7.	Mr. Stuart D. Zimring Attorney at Law Law Offices of Stuart D. Zimring County of Los Angeles	AM	N	I am concerned about the necessity of up to three signatures by the declarant. We frequently have trouble getting them to sign at all. I am also concerned about the impact of the new HIPAA privacy regulations as they may affect a declarant's willingness to sign. We should consider putting some kind of notification on the form that these declarations are exempt (assuming they are). Otherwise, the new organization is very good.	Revised form GC-335 has been designed to require only one signature, on page 1 if used only to support the conservatee's absence from the hearing on the appointment of a conservator, or on page 3 if used to support a request for exclusive authority to consent to medical treatment or if used for both of these purposes. If dementia powers are sought, only the dementia attachment, form GC-335A, would be signed even if the capacity declaration to which it is attached is also used for one or both of the other authorized purposes. See the response to the comments of Ms. Harlean Carroll and Ms. Sandra Riley concerning HIPAA.